IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 130 OF 1999

1. Smt. Mary D'Silva, wife of
Joaquim D'Silva, of major of age,
housewife, resident of Fatorda.

2. Shri Francisco Gracias, son of
Tomas Gracias, of major of age,
occupation service, represented by his
attorney Shri Antonio Caetano Gracias,
resident of Shiroda, Ponda, Goa.

3. Shri Antonio Caetano Gracias,
son of Thomas Gracias,
of major age, businessman, and
resident of Shiroda, Ponda, Goa.

4. Shri Eficiano Gracias, son of Tomas
Gracias, of major age,
resident of Shiroda, Ponda, Goa.

5. Smt. Maria Piedade Gracias Rodrigues,
of major in age, resident of
Xelvona, Curchorem,
Taluka Quepem, Goa.

6. Smt. Joana Martinha Fernandes,
wife of Pascoal Xavier R. Fernandes,
of major age, housewife and resident of
Cavelossim, Salcette, Goa.

7. Shri Joaquim D'Silva,
son of Luis Sebastiao D'Silva,
businessman, of major ge,
resident of Fatorda, Margao, Goa. ..... Appellants.

V/s.

Smt. Maria Francisca Raimunda
Fernandes Pereira, widow of Fredy
Piedade Pereira, of major age,

housewife and resident of Fatorda,
Margao, Goa. ..... Respondent.

Mr. M.S. Usgaonkar, Sr. Advocate with Mr. Sudesh Usgaonkar, Advocate for the appellants.

Mr. C. Fereira, with Shri R. Soares, Advocates for the respondent.

CORAM : S. S. PARKAR, J.

DATE : 9TH JUNE, 2005.

ORAL JUDGMENT :

This is an appeal filed by the original plaintiffs impugning the Judgment and Order dated 6th March, 1999 passed by the Addl. Civil Judge, Sr. Division, Margao in Special Civil Suit No.2/84, rejecting the prayer for specific performance of the agreement to sell the property, but granting alternate prayer, directing the defendant to pay to the plaintiffs a sum of Rs.1,97,500/- with interest at the rate of 12 % per annum on Rs.1,35,000/- from 6.1.1984 and interest at the rate of 12 % on the balance amount from the date of filing of the suit, i.e. 6.1.1984 till payment.

2. The appellants/plaintiffs had entered into an Agreement dated 24.6.1982 with the defendant for the purchase and development of her 7/8 th undivided share in the property known as “PROPRIEDADE DE

CIMA LOTE `D' “, situated at Fatorda, Margao. The defendant was owner of 7/8th undivided share of that property while 1/8th of the property belonged to Smt. Ernestina Abreu e Pereira. The plaintiffs were supposed to pay a sum of Rs.1,90,000/- being the purchase price of the said property, out of which a sum of Rs.1,35,000/- was paid as earnest money at the time of execution of the agreement. In the said agreement, an obligation was cast on the defendant/respondent to take necessary steps to get her 7/8th share separated by metes and bounds through the competent authority, within 24 months from the date of the agreement and, thereafter, within six months to get N.O.C. from the Southern Planning and Development Authority for registering the sale deed in the names of the purchasers. After obtaining the NOC from the planning authority, the defendant was to execute the sale deed within 15 days thereafter. It is the grievance of the appellants/plaintiffs that after entering into the agreement, though the earnest amount was paid, the defendant/ respondent had not taken any steps as per the agreement for separating the 7/8th share from the entire property and, therefore, the present suit was filed for specific performance of the agreement and alternatively, compensation was claimed to the extent of Rs.68,000/- as provided in the agreement itself, in addition to the refund of Rs.1,35,000/- with interest thereon. In the plaint, the plaintiffs had not even pleaded that they were still willing and prepared to perform their part of the agreement. As pointed out by the learned Counsel for respondent,

that though an application was made on 18.4.1998 to amend the plaint and add the averment that the plaintiffs were ready and willing to perform their part of the agreement, including payment of balance amount which was granted by the Court by order dated 9.9.1998, yet the plaintiffs had not amended the plaint and added the said averment.

3. On behalf of the respondent, written statement was filed in which, inter alia, it was pleaded that most of the area of the property which is the subject-matter of the suit is reserved as `green area' by the Planning Authority. In other words, the property is under reservation for green zone and, therefore, the same cannot be developed for which purpose the appellants had entered into the agreement for purchase of the property.

4. The trial Court framed issues, and after both sides led evidence, the trial Court gave findings thereon. The trial Court has held that there is an agreement for sale of 7/8th share of the defendant for a sum of Rs.1,90,000/-, out of which earnest money of Rs.1,35,000/- was paid by the plaintiffs. However, the plaintiffs had not proved that the defendant was trying to sell the suit property by taking higher consideration. The issue whether the plaintiffs prove that they would suffer irreparable injury which cannot be compensated in money in case the sale is not effected in their favour, is also held as

not proved. The trial Court has given finding that since 7/8th share in the property has not been partitioned by metes and bounds, the agreement between the parties cannot be strictly enforced and that the plaintiffs' prayer cannot be granted for the specific performance as parties had contemplated payment of damages of Rs.68,000/- to the plaintiffs in case the defendant failed to separate the share by metes and bounds.

5. Mr. Usgaonkar appearing for the appellants contended that the parties had provided for liquidated damages of Rs.68,000/- to the plaintiffs in case, the defendant failed to separate the 7/8th share by metes and bounds, which is not sustainable in view of the provisions of Section 23 of the Specific Relief Act. In my opinion, Mr. Usgaonkar is right in his submission. Specific performance can be granted even when a sum is specified in the contract payable in case of its breach, if the Court is satisfied that the same was mentioned only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance. However, what is important, as pointed out by Mr. Fereira appearing for the respondent is that the property was under reservation for green zone and, therefore, the same cannot be developed. That was so stated in the written statement and is deposed in the evidence of the witness No. 1 of the defendant Mr. Hendrick Pereira that the suit property was falling under green belt

and, therefore, it could not be developed. It is also deposed that under the rules, the development could not take place in the suit property unless and until it was separated from 1/8th share of Smt. Ernestina Abreu e Pereira.

6. The deposition of the defendant's witness is not challenged. What is surprising is that even today the plaintiffs are not in a position to affirm or say positively that the property, in question, is not under reservation for `green zone' or `green belt'. If the property is under green zone, the same could not be developed. In my view, since the property was falling under green zone, the same could not be developed. The agreement was for sale and development and since the property could not have been developed being under green belt, the specific performance could not be granted by the trial Court. In that view of the matter, I do not find any fault with the trial Court in not granting the specific performance of the agreement of sale and instead granted the alternate prayer for compensation as provided for in the agreement itself.

7. Mr. Usgaonkar contended that there was no reference in the agreement that the property was under reservation for green zone. The plaintiffs may not be aware that the property was under green zone, but the fact remains that since the property is under green zone, the same could not have been given for development. Mr.

Fereira, fairly suggested that since there was no mention made by the defendant about the reservation of the property under green zone, this Court may grant additional compensation to be paid to the plaintiffs. He suggested that in addition to Rs.68,000/- provided in the agreement, the defendants may be directed to pay an additional sum of Rs.68,000/- to the appellants. In my view, the amount suggested by the Counsel for the respondent is fair and just in the facts and circumstances of the case.

8. Inspite of the amendment granted by the Court, the appellants did not plead that the plaintiffs/appellants were and are still ready and willing to perform their part of the agreement, which is obligatory, in the absence of which the suit is liable to be dismissed. Mr. Fereira has cited the Judgment of the Supreme Court in the case of **Abdul Khader Rowther v. P.K. Sara Bai & Ors.** (JT 1989(3) SC 527) wherein it is held that in the absence of the averment in the plaint that the plaintiff is ready and willing to perform his part of the contract, the suit is not maintainable. Moreover, though in the written statement, it is pointed out that the suit property was under reservation and the evidence has been led to that effect by the defendant through the witness DW.1 Hendrick Pereira, the appellants have not challenged the same by leading the evidence to the contrary and the only argument advanced is that the deposition of DW.1 was not reliable and in any case, the defendant must take steps

to get the property dereserved.

9. I do not think it would be feasible to do so now. There would be lot of practical difficulties and legal hurdles. Whole thing would depend on whether it is possible to get the reservation removed. Moreover, the property cannot be developed unless the owner of 1/8th share is agreeable for division of the property. Considering the various circumstances, it would not be practicable to grant specific performance and instead additional compensation can be granted to the plaintiffs.

10. In the result, the appeal is dismissed with the modification that the defendant is directed to pay to the plaintiffs an additional sum of Rs.68,000/- over and above the amount decreed by the trial Court. The additional sum of Rs.68,000/- shall be paid with interest at the rate of 12 % p.a. from 1st July, 2005. The appeal shall stand disposed of accordingly.

S.S. PARKAR, J.

ssm.